



a Rule 60(b)(6) motion when instead it should have been a Rule 60(b)(2) motion; and (2) the Report erred because it did not consider newly discovered evidence that Petitioner contends demonstrates his actual innocence. The Court finds both objections to be without merit.

Relief under Rule 60(b) with respect to a previous habeas proceeding is available "only when the Rule 60(b) motion attacks the integrity of the habeas proceeding and not the underlying criminal conviction." Harris v. United States, 367 F.3d 74, 76 (2d Cir. 2004). Consequently, when faced with an improper Rule 60(b) motion that attacks an underlying conviction, district courts may either (1) transfer the motion to the Court of Appeals for possible certification as a second or successive motion under 28 U.S.C. § 2255, or (2) simply deny the motion as being beyond the scope of Rule 60(b). Gitten v. United States, 311 F.3d 529, 534 (2d Cir. 2002).

Petitioner's 60(b) motion is plainly an attack on his previous conviction because it asserts that he was unable to present his alibi defense at trial. Moreover, neither of Petitioner's objections does anything to change the analysis of whether his Rule 60(b) motion represents an improper collateral challenge of his underlying conviction. First, it is immaterial whether his motion is treated as a Rule 60(b)(6) motion as he originally filed it, or as a Rule 60(b)(2) motion as he now

contends it to be. No motion filed pursuant to Rule 60(b) may be used to attack an underlying criminal conviction. Harris, 367 F.3d at 76. Second, just as in his original Rule 60(b) motion, Petitioner continues to posit that he has discovered exonerating evidence that will demonstrate an alibi and thereby prove his actual innocence. This is essentially the same argument he made in his § 2255 petition, and the evidence Petitioner points to in order to advance that argument is identical to that which he has previously presented. In short, Petitioner's argument impermissibly challenges his underlying criminal conviction. Petitioner does not once challenge the integrity of the habeas proceeding in his objections to the Report, and therefore the objections do not alter the analysis of whether his motion is beyond the scope of Rule 60(b).

Having considered petitioner's objections, the Court concludes that the Report is well grounded in law and thorough. Petitioner's present motion is beyond the scope of Rule 60(b).

For the foregoing reasons, the Court adopts the Report in its entirety. Petitioner's motion [dkt. no. 9] is DENIED.

SO ORDERED.

April 4, 2011  
New York, New York

  
LORETTA A. PRESKA  
Chief U.S. District Judge